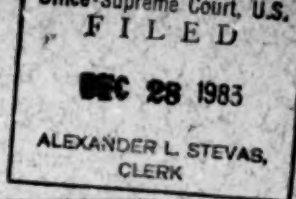


No. 83-685



In the Supreme Court of the United States

OCTOBER TERM, 1983

MARINE CORPS EXCHANGE, ET AL., PETITIONERS

v.

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether compensation for permanent total disability under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 901 *et seq.*, may be based on the injured employee's actual earnings if the employee is already receiving compensation for permanent partial disability from a prior injury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1c-4c) is not reported. The opinions of the Benefits Review Board (Pet. App. 1b-21b, 1d-27d) are reported at 10 Ben. Rev. Bd. Serv. (MB) 442 and 14 Ben. Rev. Bd. Serv. (MB) 784. The opinions of the administrative law judge (Pet. App. 1a-22a, 1c-8c) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5e) was entered on August 25, 1983. The petition for a writ of certiorari was filed on October 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 21, 1969, respondent Elton Morgan injured his back during the course of his employment as an assistant warehouse manager for petitioner Marine Corps Exchange (Pet. App. 3a). He received partial disability payments for this injury (*id.* at 3a-4a). Morgan continued to work, with periodic medical treatment, even though he suffered from episodes of severe low back pain (*ibid.*). In October 1971, he underwent lower back surgery, but was able to return to work in December 1971 subject to restrictions on bending, twisting, and lifting activity (*id.* at 4a). Morgan spent three to four hours of each work day lying down, during which time he performed the administrative portions of his job (*id.* at 5a). This arrangement continued for several years even though Morgan's condition continued to worsen (*id.* at 4a-5a).

On August 27, 1976, Morgan suffered a second accidental injury to his back while attempting to open a sliding door at work (Pet. App. 6a). He was unable to return to work after this incident and sought compensation benefits for a permanent total disability under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.*, made applicable by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 *et seq.* Fireman's Fund Insurance Company was the insurer at the time of Morgan's first injury, and petitioner Commercial Union Insurance Company was the insurer for Marine Corps Exchange on the date of the second injury.¹

¹Under 33 U.S.C. 908(a), weekly benefits due an injured employee for a permanent total disability are 66-2/3% of his average weekly wage, as determined under 33 U.S.C. 910. Under 33 U.S.C. 908(c)(21), benefits due an injured employee for a permanent partial disability are 66-2/3% of the difference between the injured employee's average weekly wage and the wage-earning capacity remaining after the injury. The parties stipulated that Morgan's salary was \$176 per week at the time of the first injury and \$294.38 per week at the time of the second injury (Pet. App. 13d n.3, 17d-18d).

2. Based on Morgan's "inability to perform even the limited physical tasks required of him in his last employment," the administrative law judge awarded him benefits for permanent total disability dating from August 27, 1976 (Pet. App. 19a). The ALJ found that the disability was "due to the cumulative effects of everything that ever happened to [Morgan's] back beginning with the lifting and twisting incident on April 21, 1969, and ending with the sliding-door episode on August 27, 1976" (*id.* at 18a-19a). The ALJ therefore found Fireman's Fund exclusively responsible for medical treatment and compensation payments for the period from the first injury until the second. He found Fireman's Fund and petitioner Commercial Union equally liable for all medical treatment and compensation benefits following the second accident (*id.* at 21a); after August 28, 1978, the ALJ ruled, compensation payments would be paid out of the special fund established by Section 44 of the LHWCA, 33 U.S.C. 944 (Pet. App. 21a).²

The Benefits Review Board affirmed the ALJ's finding that the 1976 incident was an "injury" within the meaning of the LHWCA (Pet. App. 7b-16b) and also held that 33 U.S.C. 908(f) limited the carriers' liability (Pet. App. 18b-20b). The Board, however, rejected the ALJ's apportionment of liability between the two carriers. Holding that the LHWCA makes an employer absolutely liable for work-related injuries, including the aggravation of any

²Section 44 of the LHWCA establishes a "special fund," financed by assessments on authorized self-insured employers and carriers, from which certain payments are made. The LHWCA authorizes payment from the fund to a worker in situations where, as here, an employee who had become permanently partially disabled as a result of one injury thereafter sustains another job-related injury which, in combination with the first injury, renders the employee permanently and totally disabled. 33 U.S.C. 908(f). The employer's liability in such a case is limited to 104 weeks, at which time the special fund takes over payments. *Ibid.*

pre-existing condition, the Board ruled that petitioner Commercial Union would be solely responsible for the results of the 1976 injury and that Fireman's Fund would continue to be liable for any disability flowing from the 1969 injury. *Id.* at 16b-18b. To determine the respective liabilities of the insurers — *i.e.*, the amount of Morgan's lost wage-earning capacity as a result of the 1969 injury and the amount of the loss of his remaining wage-earning capacity in 1976 — the Board remanded to the ALJ for a determination of the "nature and extent of partial disability, if any, flowing from the 1969 injury" (*id.* at 18b).

On remand, the ALJ determined that Morgan's actual earnings after his first injury did not fairly represent his post-injury wage-earning capacity, and therefore it fixed a reasonable wage-earning capacity, taking into account the appropriate factors (Pet. App. 5c-7c).³ The ALJ considered Morgan's worsening condition, his age, his education and experience, his seniority, his ability to conduct a major portion of his job even with restrictions on physical activity, and the effect of the back disease had the 1976 injury not occurred, and concluded that "[Morgan's] earning ability had been diminished by fifty percent at the time of his last back injury as a result of his first accidental back injury * * *" (*id.* at 7c-8c).

The Board found that substantial evidence supported the ALJ's determination of the extent of Morgan's permanent partial disability existing after the 1969 injury, even though the ALJ had expressed Morgan's wage-earning capacity as

³Under 33 U.S.C. 908(h), wage-earning capacity of an injured employee is determined by the employee's actual earnings; if, however, those earnings do not fairly and reasonably represent his wage-earning capacity, a reasonable wage-earning capacity shall be fixed, giving due regard to the nature of the injury, the degree of physical impairment, his usual employment, and any other relevant factors.

a percentage rather than as a dollar figure (Pet. App. 9d-12d). Because it was clear that the ALJ had properly considered the statutory factors in making his determination, the Board declined to remand the case to the ALJ for the mechanical computation of the permanent partial disability award. Instead, based on the ALJ's percentage finding, the Board awarded permanent partial disability benefits in the amount of \$58.66, or 66-2/3% of the difference between \$176 (claimant's average weekly wage in 1969) and \$88 (claimant's wage-earning capacity after the 1969 injury, *i.e.*, 50% of \$176) (*id.* at 13d & n.3). See 33 U.S.C. 908(c)(21).⁴

Relying on *Hastings v. Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980), the Board held that a claimant may receive concurrent awards for a permanent partial disability and a permanent total disability arising from two distinct injuries (Pet. App. 13d). The Board then calculated the amount of the permanent total award based on Morgan's actual wages of \$294.38 per week at the time of the second injury (*id.* at 13d-16d).⁵ The Board found that "[Morgan's] ability to earn wages in the open labor market remained the same" between the time of his two injuries, and therefore there was no need to adjust the permanent partial award (*id.* at 18d-21d). Thus, the Board ordered petitioner Commercial Union to pay Morgan 66-2/3% of \$294.38 — Morgan's weekly wage at the time of the second injury — to compensate for his permanent total disability (*id.* at 18d).

3. The court of appeals affirmed in an unpublished memorandum (Pet. App. 1e-4e). The court found that there was substantial evidence in the record to support the

⁴The amount of this permanent partial disability award assessed against Fireman's Fund is not in dispute here.

⁵33 U.S.C. 910 requires that the average weekly wage at the time of the injury be used as the basis for a computation of compensation.

findings that the 1976 incident was an "injury" under the LHWCA and that Morgan had lost 50% of his wage-earning capacity after the 1969 injury (*id.* at 2e-3e). The court also ruled that the Board had applied the proper standard in determining the amount of compensation due as permanent total disability benefits. The court expressly approved consideration of the two injuries separately for purposes of computing benefits and agreed that the total disability award was "correctly based on Morgan's full 1976 salary" (*id.* at 4e).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the decision involves a "unique" fact situation that resulted in a holding expressly stated by the Board to be "limited to the facts of this case" (Pet. App. 21d n.6). It presents no issue warranting review by this Court.

Petitioners contend (Pet. 15-27) that the Benefits Review Board erred in basing the compensation for Morgan's total disability on his actual earnings at the time of the second injury, rather than computing an earning capacity as reduced by the first injury. As the court of appeals correctly held, however (Pet. App. 3e-4e), the second injury was a separate incident for which his earning capacity at the time was relevant. That earning capacity was not necessarily related to his 1969 earning capacity. In fact, the Board found it to be higher — equal to his 1976 salary — a finding that was upheld by the court of appeals (*id.* at 4e).⁶

Petitioners mistakenly contend (Pet. 20-25) that the decision below conflicts with *Hastings v. Earth Satellite Corp.*, *supra*. In *Hastings*, the claimant was first partially disabled

⁶As the Board noted, some of the apparent salary increase subsequent to the first injury can be ascribed to inflation. See Pet. App. 20d n.5.

by a stroke and later totally disabled by pulmonary emboli and phlebitis. 628 F.2d at 86-87. The court of appeals affirmed the Board's determination that the total disability award had to be based on the earning capacity prior to the totally disabling injury and thus rejected Hastings' contention that his total disability award should be based on the same average weekly wage as was his partial disability award (*id.* at 90-91). Relying on a hypothetical used by the *Hastings* court that indicates that the basis for the second award must reflect the diminution in the claimant's earning capacity because of his disability (*id.* at 91; see Pet. 22-24), petitioners mistakenly contend that the base salary for Morgan's total disability award should be 50% of his salary at the time of the second injury (Pet. 20-21). But *Hastings* lends no support to this contention. Although they disagreed on the ultimate figure (see page 8, *infra*), both Board and the court there looked to Hastings' actual earnings in the period prior to his second injury as the basis for the total disability award—without reducing those earnings by the percentage of partial disability (see 628 F.2d at 88, 95). This approach was fully consistent with the court's earlier hypothetical because Hastings' actual earnings at the time of the second injury naturally reflected the effect of his partial disability. The same is true in Morgan's case.⁷ Thus, the decision below is in accord with *Hastings*. Both decisions rest on the fundamental premise that "the employee's earning capacity during the time preceding the second injury must be the basis of computing benefits attributable to the second injury" (628 F.2d at 90).

⁷Thus, petitioners err in asserting (Pet. 25-27) that the decision below authorizes a "pyramiding" of liability that gives Morgan an award that represents an impermissibly high percentage of his earning capacity. This contention assumes that, prior to his second injury, Morgan had the same earning capacity as if he had not been injured in 1969. This assumption does not accord with the finding of partial disability resulting from the first injury, *i.e.*, that Morgan's earning capacity was reduced by the amount of \$88 per week. If so, and that finding is not challenged here, Morgan's salary in 1976 would have been \$382.38 (\$294.38 plus \$88.00) had he not been partially disabled earlier and his

Indeed, the portion of the court of appeals' opinion reversing the Board in *Hastings* lends further support to the decision below. The ALJ and the Board calculated Hastings' "average weekly wage" (the basis for the compensation award) by looking at his earnings for the entire preceding year, pursuant to the computation set forth in 33 U.S.C. 910(a) (628 F.2d at 95). The court of appeals rejected that calculation because it did not reasonably and accurately reflect the increased number of hours Hastings had been working per week in the latter portion of that year — immediately prior to the time he became totally disabled (*ibid.*). Instead, the court ruled, Hastings' average weekly wage computation should have been adjusted to reflect his "true earning capacity" by focusing on the most recent period before the injury (*id.* at 95; see 33 U.S.C. 910(c)). The Board found in this case, however, that no such adjustment was necessary because "claimant's average weekly wage in this case is ascertainable by the use of claimant's actual wages at the time of the second injury" (Pet. App. 17d). Therefore, the computation set forth in 33 U.S.C. 910(a) was correctly used here. Thus, *Hastings* recognizes that, in determining average weekly wage for purposes of computing permanent total disability compensation, it is actual earnings over the prior year that are relevant so long as they reasonably and accurately reflect earning capacity — as the Board found they did in this case (see Pet. App. 17d). See 628 F.2d at 95-96.

total disability award would be 66-2/3% of that — \$254.89. That figure is equal to the compensation approved below — \$196.23 total disability plus \$58.66 partial disability.

By the same token, petitioners' reliance (Pet. 26-27) on another Ninth Circuit case, *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (1956), is misplaced. That case simply holds that a schedule award for facial disfigurement cannot augment a total disability award for the same injury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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